

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1196

To be argued by
PHYLIS SKLOOT BAMBERGER

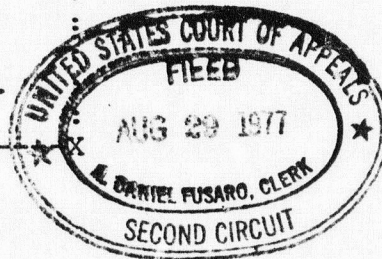
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-against-

CHARLES RUSSO,
Defendant-Appellant.

Bp/s
Docket No. 77-1196



REPLY BRIEF FOR APPELLANT
CHARLES RUSSO

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

MARTIN ERDMANN, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
CHARLES RUSSO
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,

Of Counsel.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

CHARLES RUSSO,

Defendant-Appellant.

Docket No. 77-1196

REPLY BRIEF FOR APPELLANT
CHARLES RUSSO

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

The Government's response to Point II of appellant's brief misconstrues the appellant's argument. Appellant does not attack the sufficiency of the indictment -- but the presentation to the jury of a crime which was not charged in the indictment: conspiracy to conduct a gambling business which has a daily gross revenue of \$2,000. But, says the Government, the indictment was sufficient to charge the missing element because the element was merely a jurisdictional one that the appellant need not have known about (see respondent's brief at 18 n.14), and because an indictment charging a conspiracy need not spell out the substan-

tive offense which is the object of the conspiracy.

The Government's notion that jurisdictional elements are not elements of the crime is rejected under footnote 9 in United States v. Feola, 420 U.S. 671, 676 (1975). As with any other element the accused must be notified that the jurisdictional element is part of the crime charged. Whether the defendant must have knowledge of the jurisdictional element in order to commit the crime, is quite another question from whether the accused must be put on notice that the Government intends to prove this element as part of the crime charged and to advise the defendant that he, too, may seek, prior to trial, relevant evidence. The defendant must be apprised of what he must be prepared to meet. Russell v. United States, 369 U.S. 749 (1962).

The Government claims it need not give the appropriate notice because it cannot be required to speculate in a conspiracy indictment which jurisdictional aspect of the conspiracy would have occurred if the game became operational. This excuse does not serve the Government even on its own theory of how this case should be prosecuted. As expressed by the Government in its brief, the question in this conspiracy charge was whether the plan was capable of producing a game operational for 30 days or a game which would have a daily gross revenue of \$2,000. On this theory, the Government need not have speculated as to the future events because presumably at the time the indictment was drawn the prosecution had sufficient information about the plan to have permitted an appraisal of whether the plan would have

produced a game that met the particular jurisdictional element. If other evidence developed, the Government was free to present a superseding indictment.

In this case, the Government deliberately chose to charge the appellant with the 30-day element of the crime, and not the \$2,000 element. The Government so notified the appellant in the indictment. The indictment charged that a gambling operation was conducted between January 20 and April 20, 1973. It alleged that a conspiracy to run a gambling operation took place in the same period. The Government's theory was that one continuing operation took place in that period of time. There was no basis in the indictment for believing that the Government would not adhere to its choice of jurisdictional element or would change its mind.

The Government argues that the conspiracy indictment need not state with technical precision all the elements essential to the commission of the substantive offense which is the object of the conspiracy. Whatever the validity or generality of that proposition it cannot serve to justify an indictment which does not mention an element or provide any way to put the defendant on notice of what it might be. Reference to the statute itself would not have helped the appellant for all he would have found was that there were alternative elements from which the Government had already made its choice. In the face of the Government's choice of element, counsel could believe that a request for a bill of particulars which had to be made prior to trial would have produced no further information as to the

elements the Government would have proven. Thus, although in most instances, reference to the substantive statute would provide notice, that is not the situation here. Even when the charge is conspiracy involving a crime with jurisdictional element, in most instances the defendant can be put on notice of even the jurisdictional element by citation to the substantive statute (use of mails, interstate commerce, federal employment) because there is a single basis for jurisdiction. Here, reference to the statute is not sufficient where the Government has made its election in the indictment.

The Government argues that counsel should have sought to have stricken the evidence dealing with the daily intake if the \$2,000 alternative was not an element of the crime. However, the evidence was admissible to show how the game was played and the circumstances, even if the \$2,000 alternative was not charged as an element. When, however, the Government switched gears and decided that the evidence was not simply proof of the circumstances of the game, but of an uncharged element of the crime, the defense was prejudiced.

The prejudice here was that the defense was unable to investigate and to prepare prior to trial any information concerning the allegation of daily \$2,000 gross revenue.

Conclusion

For the above-stated reasons the conviction should be reversed.

Respectfully submitted,

MARTIN ERDMANN, ESQ.,
THE LEGAL AID SOCIETY
Attorney for Defendant
CHARLES RUSSO
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,

Of Counsel.

August 26, 1977

CERTIFICATE OF SERVICE

Aug 25, 1977.

I hereby certify that a copy of this brief ~~and~~
~~appendix~~ has been mailed to the ~~United States Attorney~~
~~for the Eastern District of New York.~~ Dept. of Justice

For SK Pang